

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
Warming Devices Products ) (JNE/DTS)  
Liability Litigation )  
Friday, June 28, 2019  
Minneapolis, Minnesota  
Courtroom 9E  
9:12 a.m.  
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BEFORE THE HONORABLE DAVID T. SCHULTZ  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(STATUS CONFERENCE)**

APPEARANCES

FOR THE PLAINTIFFS: MESHBESHER & SPENCE LTD.  
Genevieve M. Zimmerman  
1616 Park Avenue  
Minneapolis, Minnesota 55404  
  
CIRESI CONLIN LLP  
Michael A. Sacchet  
225 South Sixth Street, #4600  
Minneapolis, Minnesota 55402  
  
KENNEDY HODGES LLP  
Gabriel Assaad  
4409 Montrose Boulevard, #200  
Houston, Texas 77006  
  
FOR THE DEFENDANT: BLACKWELL BURKE P.A.  
Benjamin W. Hulse  
Ted Hartman  
431 South Seventh Street, #2500  
Minneapolis, Minnesota 55415  
  
COURT REPORTER: Renee A. Rogge, RMR-CRR  
300 South Fourth Street, #1005  
Minneapolis, Minnesota 55415

1                                    P R O C E E D I N G S

2                                    IN OPEN COURT

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4                    THE COURT: All right. Let's go on the record.

5                    All right. We're on the record In the Matter of  
6                    Bair Hugger, MDL No. 15-2666.

7                    Counsel for the plaintiffs, would you note your  
8                    appearances for the record, please?

9                    MS. ZIMMERMAN: Good morning, Your Honor.  
10                    Genevieve Zimmerman for plaintiffs.

11                    THE COURT: Good morning.

12                    MR. ASSAAD: Good morning, Your Honor. Gabriel  
13                    Assaad for the plaintiffs.

14                    THE COURT: Good morning.

15                    MR. SACCHET: Good morning, Michael Sacchet.

16                    THE COURT: Good morning.

17                    And for the defendant.

18                    MR. HULSE: Good morning, Your Honor. Ben Hulse  
19                    for 3M.

20                    MR. HARTMAN: Ted Hartman for 3M.

21                    THE COURT: Good morning to all of you.

22                    All right. A couple of things. First of all, I  
23                    have skimmed what was filed, but I will be up front. I was  
24                    away until last night at a judicial conference, so I am  
25                    perhaps not as intimately aware of the contents of this as I

1 would otherwise be. So just know that.

2 More importantly, I was with Judge Ericksen at  
3 this conference. Again, it has nothing to do with this  
4 case. But she made an observation that she wanted me to  
5 pass along or attend to about the documents that have been  
6 filed that are under -- well, they're covered by the  
7 protective order under seal currently. She wanted to make  
8 sure that I talked to you about that.

9 They are now, first of all, they are now sealed,  
10 correct?

11 MS. ZIMMERMAN: The PowerPoint, yes, Your Honor,  
12 is sealed.

13 THE COURT: Yes. Okay. We're talking about the  
14 document that -- all right. Now, and the issue I think is  
15 they were displayed during the trial, right?

16 MS. ZIMMERMAN: And they were also displayed  
17 during the four-and-a-half-hour reconsideration motion that  
18 we had on the 12th of June.

19 MR. HULSE: They were not displayed at trial, Your  
20 Honor. They were excluded from evidence at trial.

21 THE COURT: Okay. Well, in any event, this is not  
22 Judge Ericksen's words. These are sort of my words. And I  
23 am not suggesting that Judge Ericksen is the bear, but you  
24 are kind of poking the bear with this one in that you may  
25 well be right that somehow this is waived and they shouldn't

1 be under seal. I don't know. Just don't use self-help on  
2 that. If you want to bring a motion, or if there's been a  
3 motion, the court will rule on that, but I think the message  
4 that I was hearing from Judge Ericksen was don't file those  
5 particular documents, which I think have been the subject of  
6 some consternation, without filing them under seal until  
7 such time as the court rules on a motion itself. Okay?

8 MS. ZIMMERMAN: Thank you, Your Honor. I think  
9 that from the plaintiffs' perspective we're probably not,  
10 frankly, prepared to argue this today.

11 THE COURT: Right. No, I don't expect you to, but  
12 go ahead.

13 MS. ZIMMERMAN: But to the extent that there is  
14 any kind of confusion, what has been filed is a PowerPoint  
15 that has excerpts that defense counsel has made some  
16 objection to that do come from sealed documents.

17 THE COURT: Right.

18 MS. ZIMMERMAN: They have been on notice since  
19 February 21st, when we filed our objection to their motion  
20 for reconsideration, what documents we intended to rely upon  
21 in our opposition. All of those documents are contained  
22 within our -- our exhibits.

23 In addition, if you look at Pretrial Order No. 7,  
24 this court and Judge Ericksen have specifically said that  
25 documents that are displayed and used in public hearings are

1 not confidential documents. So I think that -- and I don't  
2 want to slice the hair too finely here.

3 THE COURT: Yeah.

4 MS. ZIMMERMAN: But the document itself, the -- so  
5 the underlying documents that are excerpted from --

6 THE COURT: Right.

7 MS. ZIMMERMAN: -- those have not been filed  
8 publicly. The PowerPoint, which we offered to the court and  
9 which was received without objection, was filed. Again, it  
10 was without objection. And from our perspective, it is  
11 necessary that it be part of the formal record in the event  
12 that we go on appeal. So it was offered; it was received;  
13 we filed it.

14 And I understand, I think, what Your Honor is  
15 trying to communicate, but I do think that at least from our  
16 perspective there is also a difference between the  
17 underlying documents themselves and the PowerPoint that was  
18 formally presented, you know, offered, received, and now is  
19 part of the record, so --

20 THE COURT: It may well be. I don't know. But  
21 it's not -- I guess what I am saying or at least what I am  
22 hearing -- and I will give you a second in a second,  
23 Mr. Hulse -- I don't think there's any question that the  
24 document is part of the record for purposes of appeal. And  
25 I haven't gone back to reread Pretrial Order No. 7. As a

1 practical matter, there's a difference at least in my  
2 mind -- I don't know what Judge Ericksen would say --  
3 between something that gets displayed in a motion hearing  
4 where, frankly, nobody is at, not that my intern back there  
5 is a nobody, but I'm saying no public members are present.  
6 That's different from having it being filed on PACER and  
7 accessible that way. So -- but I think the document is part  
8 -- I assume the document is part of the record, but right  
9 now it's not accessible to the general public on PACER.

10 But, Mr. Hulse, do you have any comment?

11 MR. HULSE: Your Honor, if I may just take three  
12 minutes and quickly use the projector?

13 THE COURT: Sure. I'm not deciding anything.

14 MR. HULSE: Understood. And that's part of what  
15 we were getting at. Our viewpoint is if plaintiffs wish to  
16 get reconsideration on Judge Ericksen/Judge Noel's sealing  
17 orders that there's a mechanism under the rules for doing  
18 that, that it's not appropriate for them to just decide that  
19 they're not going to follow those orders.

20 And that's particularly in light of this minute  
21 entry from Your Honor where we're talking about at least one  
22 of the same documents, the Bair Paws document, where the  
23 plaintiffs included an excerpt from it in their *Gareis*  
24 appellate court brief and then said at the time, and I take  
25 this at face value, that it was an accident. And Your Honor

1       said in this -- in the court minutes, "Should any document  
2       sealed by order of this court be publicly filed in any  
3       future proceeding in this court, the responsible filing  
4       attorney will be subject to monetary or other sanctions."  
5       To us what happened last Friday is clearly within the scope  
6       of this order. It was a public filing of under-seal  
7       materials.

8               So, again, I'm not -- I'm not standing here today  
9       asking this court to enter sanctions against plaintiffs'  
10      counsel for that. That will be the subject of separate  
11      briefing. But there has been a warning on this.

12             And two other things -- or one other thing really.  
13      So the key argument that plaintiffs' counsel have made here  
14      is because they put these documents through their own  
15      PowerPoint in front of the court -- of course, there are no  
16      cameras allowed in the courtroom, so people --

17             THE COURT: Other than that one.

18             MR. HULSE: Right. Exactly. Other than that one.  
19      But people can't take pictures of it. There's a difference  
20      between displaying something in a courtroom and then filing  
21      it on the public record. These same documents they properly  
22      filed under seal in connection with their -- their  
23      opposition to the reconsideration motion, so they are part  
24      of the appellate record if this goes up on appeal. The  
25      PowerPoint itself is not evidence, of course. The court --

1 Judge Ericksen did not admit it as evidence. The court  
2 received copies of it, but did not admit it, and the court  
3 did not tell plaintiffs' counsel that they had the right to  
4 file it.

5 And then the one other thing too, their argument  
6 too, this is an argument that they have repeatedly made to,  
7 previously, to Judge Noel and to Judge Ericksen too saying,  
8 you know, the information on these documents -- they  
9 specifically addressed the Bair Paws document -- was  
10 discussed at length in the hearing regarding the respective  
11 motions for which each was filed in support. This is  
12 from -- this is from the MDL master docket. They argued the  
13 same thing again about the Bair Paws document in *Gareis*.  
14 And in *Gareis* Judge Noel overruled that objection and sealed  
15 the Bair Paws document. And then in the master docket Judge  
16 Ericksen -- this happened previously. Judge Ericksen,  
17 actually, it's the only time she overruled Judge Noel in the  
18 case. Judge Noel had unsealed -- or had unsealed the Bair  
19 Paws document. Plaintiffs -- we sought to have that  
20 overturned. Plaintiffs argued again this document was  
21 displayed at a public hearing, and Judge Ericksen overruled  
22 that objection.

23 So regardless of their interpretation of PTO-7,  
24 which they've spent three years, much more recently,  
25 within -- within the last year, Judge Ericksen has



1 specifically addressed this issue, this argument, and  
2 rejected it. And they know that.

3 THE COURT: Okay. Very well.

4 So here's -- here's all I'm going to say further  
5 on this:

6 If you wish to bring a motion affirmatively  
7 seeking relief that the PowerPoint can be filed publicly,  
8 you're well within your rights to do that.

9 If you want to bring a motion for sanctions, you  
10 are well within your rights to do that.

11 All I am trying to communicate is that I think  
12 Judge Ericksen has been clear in her discussions with me  
13 that she'd rather not see this issue arise in the context  
14 of, sort of, what I've described as self-help. Don't just  
15 file it and then, you know -- right? So if there's  
16 reference to a sealed -- the contents of a sealed document  
17 or sealed document and you think it should be unsealed, by  
18 all means present that issue. Okay?

19 MS. ZIMMERMAN: Thank you, Your Honor. I  
20 appreciate that observation.

21 I think that -- and we will look to see what  
22 additional motions need to be brought pursuant to PTO-7, but  
23 I think that the problem from our perspective is that we are  
24 really in a trick box here where the parties have prepared  
25 and presented PowerPoints throughout the course of this MDL

1 because it's complicated. Medicine is complicated,  
2 engineering.

3 THE COURT: Right.

4 MS. ZIMMERMAN: There's a lot of legal issues  
5 here. PTO-7 -- and this is going to be obviously apparently  
6 the subject of additional briefing, but it really puts the  
7 onus on defendants. Once they, once -- well, frankly, on  
8 both sides. You have to talk about whether or not there's  
9 going to be confidential information that may be used at a  
10 hearing beforehand. We did that by identifying all the  
11 documents that we used to oppose their motion on February  
12 21st. They knew because of the binder of materials this  
13 thick (indicating) what we were going to use, but they  
14 didn't bring a motion to seal the courtroom ahead of time.  
15 There were absolutely people in the presence -- in the  
16 jury -- pardon me -- in the gallery that were not part of  
17 this case. And it's a publicly -- it's a publicly-available  
18 courtroom.

19 Now, I understand the court's direction with  
20 respect to self-help, and we will certainly keep it in mind,  
21 but I think that there is really a difference between what  
22 Mr. Hulse is suggesting, which is the underlying documents  
23 that Judge Noel thought, yes, should be unsealed, and I  
24 understand Judge Ericksen said, no, we are going to keep  
25 them sealed, but there's a difference between those

1 underlying documents and the publicly-available, presented  
2 in an open courtroom, PowerPoint presentation that we made.

3 And Pretrial Order No. 7, which I guess we will  
4 get into at some point, really talks about what the process  
5 is supposed to be, that when things are presented in a  
6 public courtroom they are then publicly-available  
7 information. So the PowerPoint was offered, received,  
8 without objection. I don't know when defense counsel  
9 intends to file theirs, but we want to make sure that it was  
10 part of the record even if we offered it and it was  
11 received.

12 With respect to the rest on sanctions, you know,  
13 frankly, that's scheduled to be heard before Your Honor on  
14 the 16th of July. There is a related motion that we expect  
15 to file on Tuesday morning on the same subject matter, and  
16 we would hope that it will be heard then on the same day.  
17 They should have enough time to respond. We'd called  
18 previously to see if it would be possible for Your Honor to  
19 hear it in the morning, instead of the afternoon. There are  
20 a couple of us --

21 THE COURT: What did Your Honor say?

22 MS. ZIMMERMAN: That they would check with Your  
23 Honor if it would work.

24 THE COURT: Okay.

25 MS. ZIMMERMAN: But it was a couple weeks ago.

1 THE COURT: Okay.

2 MS. ZIMMERMAN: There are at least two of us that  
3 are traveling internationally for depositions and expert  
4 meetings.

5 THE COURT: I expect that's fine. I don't know.  
6 Hang on one second.

7 MR. HULSE: Yes. My understanding is they are  
8 cross moving for sanctions against us, Your Honor, against  
9 3M's lawyers, for saying that the -- our sanctions motion  
10 was false and defamatory.

11 THE COURT: Okay. Hang on. We're looking at my  
12 calendar.

13 (Off-the-record discussion.)

14 THE COURT: We'll move it around so you can do it  
15 in the morning on the 16th, and we'll get some notice out to  
16 you. Okay?

17 MS. ZIMMERMAN: If you can do that, that would be  
18 fantastic, Your Honor; otherwise, we will just run from here  
19 to the airport.

20 THE COURT: No, no. Understood. We will do that.  
21 Make a note that we will have to attend to that.

22 So, anyway, to wrap up this discussion, I'm not  
23 deciding anything about the PowerPoint today, but let's --  
24 if it's important to the plaintiffs that the document be  
25 publicly available, whether it's a PowerPoint or something

1 else, I just think you will do yourselves a favor by  
2 bringing that up in a manner that allows us to address it  
3 before the document is placed on PACER. Okay?

4 MS. ZIMMERMAN: And I think that we do have at  
5 this point many, many sealed documents that are probably  
6 going to need to be ruled on one way or another by Your  
7 Honor. I mean, we filed things under seal, but a number of  
8 them probably shouldn't be.

9 THE COURT: Okay. Fair enough.

10 So the second thing, at least on my agenda, is  
11 whether we have any other -- do we have any, broadly  
12 speaking, discovery case management issues that we need to  
13 deal with? I'm not, frankly, aware of any, but I may not  
14 be.

15 MR. HULSE: Your Honor, just I think as a point of  
16 information, as Your Honor may be aware, that there is  
17 another case ongoing. It's really the only kind of active  
18 individual case, and that's in Hidalgo County, Texas. It's  
19 called the *Petitta* case. And just purely as a way of  
20 update, there was a hearing, a motions hearing last week,  
21 and it does relate to the confidentiality issue, is that  
22 what -- the plaintiffs have filed a motion to compel that is  
23 essentially arguing that we are not entitled to  
24 confidentiality on any of our documents, and so it's sort of  
25 a collateral attack on confidentiality here. So there's --

1 just by way of update, that has been argued, that is before  
2 the judge. Clearly, if he grants it, then we have a  
3 problem, right, because we will have conflicting orders on  
4 confidentiality and sealing in the two courts. If he denies  
5 their motion, then we are fine. But just given that that  
6 concerns the backdrop of three years of discovery and  
7 extremely extensive litigation over confidentiality in this  
8 court, I just thought the court should be aware that's going  
9 on.

10 THE COURT: Okay. Is that in -- did you say  
11 Hidalgo County?

12 MR. HULSE: Yes.

13 THE COURT: So it's state court?

14 MR. HULSE: That's right. Judge Singleterry in  
15 state court in Hidalgo County, Texas.

16 THE COURT: Okay. All right. Anything that you  
17 feel you need to say about that?

18 MS. ZIMMERMAN: Yes, Your Honor. That case has  
19 been pending for now nearly three years. For the first time  
20 about ten days ago defense counsel brought a motion for res  
21 judicata. There were two cases filed simultaneously within  
22 I think three days of each other, one in the MDL, one in  
23 state court, made very clear to defense counsel and to this  
24 court that the plaintiff intended to proceed with their case  
25 in Texas state court. That was in every single joint status

1 report starting in January 2017 through the last one, which  
2 I think was last December. They understood that they were  
3 -- that the plaintiff was going to prosecute his case down  
4 in Hidalgo County. Mr. Hulse has now brought a motion  
5 asserting for the first time a res judicata defense, that  
6 the case was decided fully and on its merits up here in the  
7 MDL, despite the fact there was no answer and no discovery  
8 conducted and that they knew the entire time that the case  
9 was going to go forward in state court. So that case has  
10 gone up to the Court of Appeals on some of the other  
11 defendant issues. The hospital has settled in that case.

12 THE COURT: Which court of -- now you have  
13 answered the question I hadn't yet asked. Okay.

14 MS. ZIMMERMAN: Right. So it's also been pending  
15 down there for more than a year, so will not be part of this  
16 MDL no matter what happens with the --

17 THE COURT: Which Court of Appeals? Texas?

18 MS. ZIMMERMAN: Texas.

19 THE COURT: Intermediate, the civil --

20 MS. ZIMMERMAN: Intermediate. Exactly.

21 THE COURT: Right.

22 MS. ZIMMERMAN: So essentially the hostile  
23 defendants settled. They also down there sued the  
24 orthopedic surgeon. The orthopedic surgeon brought a motion  
25 to dismiss and he lost that. He then brought an

1 interlocutory appeal on that, lost that as well. And so as  
2 of last November the case was active again. The case has  
3 been moving forward on discovery.

4 3M's counsel has brought a motion for a permanent  
5 injunction before Judge Ericksen that will be heard on I  
6 think August 15th, asking her to enjoin the state court from  
7 moving forward on this res judicata defense, despite the  
8 fact it was never decided upon the merits. We think it's --  
9 well, we responded to their motion and we think it's  
10 meritless. Pardon me.

11 THE COURT: I was picking up on that.

12 MS. ZIMMERMAN: Yeah.

13 THE COURT: That you disagree.

14 MS. ZIMMERMAN: We disagree quite a bit.

15 With respect to this confidentiality and sealing,  
16 there are no sealing issues in the *Petitta* case down in  
17 Texas. We brought a motion to compel in that case because  
18 they had not filed any kind of -- or served any discovery  
19 responses.

20 MR. HULSE: That's not true. I'm sorry. We did.

21 MS. ZIMMERMAN: I didn't interrupt.

22 THE COURT: Yeah. No. Let's -- yeah, go ahead.

23 MS. ZIMMERMAN: So we brought a motion to compel.  
24 We did exchange potential drafts of a protective order. So  
25 it's not true that plaintiffs completely opposed the



1 protective order, but defense counsel's position in that  
2 case was that confidentiality issues in Hidalgo would be  
3 decided by the MDL court. That's not the way state court  
4 works. And so in Texas if you have not brought a motion for  
5 a protective order before your discovery is due, there isn't  
6 going to be a protective order. We couldn't reach  
7 agreement.

8 And so at this point there is a motion to compel  
9 production of documents. They have also brought a motion  
10 for a protective order. Both of those issues are under  
11 advisement by Judge Singleterry in Hidalgo County. But  
12 there's no motion by defense counsel to seal any documents.  
13 They have not brought a motion to seal the motion to compel  
14 we brought, which is part of the basis for their sanctions  
15 motion that we'll be hearing before Your Honor in a little  
16 over two weeks.

17 THE COURT: Okay.

18 MR. HULSE: And, Your Honor, I just -- I know you  
19 probably don't want to hear that much about --

20 THE COURT: Go ahead.

21 MR. HULSE: -- more about this. The reason I  
22 brought it up is not to argue this -- the res judicata  
23 issue, which will be before Judge Ericksen, and not to -- it  
24 was simply to let you know that there is a collateral attack  
25 going on in Texas state court against the confidentiality

1 rulings in this court. Plaintiffs' counsel obviously very  
2 strongly disagree with the orders that have come out of this  
3 court on confidentiality. They don't like it. They want to  
4 disseminate these documents. And they have gone into Texas  
5 state court thinking that's going to be more receptive to  
6 them, and they have argued that we don't have a basis for  
7 confidentiality over any of our documents. The reason it is  
8 of concern to this court is precisely because if they  
9 prevail there everything that we have been fighting over on  
10 confidentiality for three years here is moot. And so that  
11 is, I think, a matter that should be of concern to this  
12 court.

13 THE COURT: Yeah, I don't know obviously anything  
14 other than what you just said, and I certainly don't know as  
15 a matter of federalism or jurisdiction what would happen  
16 ultimately in that circumstance, but I'm assuming that if it  
17 becomes an issue for this court it will be part of a motion  
18 either before me or before Judge Ericksen, but I understand  
19 why you brought it up. I well understand your response.

20 I have litigated in Hidalgo County court, as well  
21 as federal district court. Hidalgo County is in Edinburg;  
22 federal court is in McAllen?

23 MR. HULSE: Correct.

24 THE COURT: Yeah, I have been in both of those  
25 courts.

1 MR. HULSE: And congratulations on your result in  
2 that -- that was the matter -- the pro bono matter, right?

3 THE COURT: Yeah, that was the -- well, one of  
4 them. I also had product liability cases down there. One  
5 of them was a death penalty case before Judge Noe, so --

6 All right. Any other discovery issues?

7 MS. ZIMMERMAN: You know, I think that Your Honor  
8 has properly observed that we're kind of in a position where  
9 we're really holding.

10 THE COURT: Kind of holding, yeah.

11 MS. ZIMMERMAN: And we have really endeavored to  
12 not just be treading water and waiting to see what happens  
13 with the motion for reconsideration. You know, I think,  
14 practically speaking, while we can continue to work on the  
15 buckets exercise, it's been a pretty difficult road, to be  
16 honest with you, in the last couple of weeks.

17 THE COURT: Yeah.

18 MS. ZIMMERMAN: And -- and I think that there's  
19 some -- some ground we could potentially cover, but I hate  
20 to say that it's going to require more supervision than not,  
21 but we're getting emails back and forth and it's, well, we  
22 will provide you this list and then they say, well, no, we  
23 changed our mind. And I think, well, it doesn't seem  
24 particularly productive, so --

25 You know, they were going to provide us a list of

1 the firms that hadn't responded, so we could collaborate and  
2 try and get, kind of, one master list really working. We  
3 were informed on Monday they are not going to do that  
4 anymore, they changed their mind last night. And now  
5 there's a list of 27 firms where we have some information  
6 that we need to follow up on, which I appreciate, but, you  
7 know, at 2:30 the day before the hearing that's not  
8 something that I can really resolve in a meaningful way  
9 before I get to be before Your Honor.

10 THE COURT: Yeah, let me ask you this.

11 And, again, I'll give you plenty of time as well,  
12 Mr. Hulse.

13 Here's the fundamental question, I guess. When we  
14 started down this road, first of all, there was no motion to  
15 reconsider; and then once there was a motion to reconsider  
16 that was granted in the sense that Judge Ericksen agreed to  
17 hear it, I seem to recall asking the parties, you know, do  
18 you want to go forward with this exercise or not. I'll tell  
19 you that, you know, purely as a matter of professional  
20 interest, I find this process really interesting, but, you  
21 know, that's not why you are here.

22 So I guess the question, back to both sides, is  
23 now that the motion to reconsider has been argued, and I  
24 don't have a good sense of when Judge Ericksen will rule,  
25 and I certainly have no information on what she will rule,

1 but, you know, I am assuming that whatever order comes out  
2 will come out in 30 or 60 days or thereabouts, do the  
3 parties want to put this on hold as it were until we find  
4 out what the motion to reconsider says?

5 I mean, like I said, it's -- I recognize that you  
6 are in a holding pattern and that this is a lot of work,  
7 and, you know, I have no desire to impose work on the  
8 parties that they don't have to do immediately and that they  
9 don't want to do, if that's the case.

10 So, again, I'll start with the plaintiff.

11 MS. ZIMMERMAN: Thank you, Your Honor.

12 I still think that there's a lot of value to be  
13 had in the case. I think that, you know, this has been a  
14 hard-fought litigation and it has not been less hard fought  
15 in the last 60 days than it was in the first three and a  
16 half years that we were here. I think that there's a lot  
17 that can be done if the parties are going to sit down and  
18 kind of put our heads together as collaboratively and  
19 professionally as we can. We have not had great success  
20 with that. You know, that said, I think that we owe it to  
21 the court and to the parties, including the more than 5,000  
22 plaintiffs that we represent, to try to learn as much as we  
23 possibly can so that if and when, and we feel confident  
24 about both the motion papers that we submitted and the  
25 argument that we presented to the court, that when this

1 court --

2 THE COURT: Let me just say that I didn't observe  
3 the motion. I wish I had been able to, but I was unable.  
4 So, anyway, go on.

5 MS. ZIMMERMAN: Well, we would have welcomed your  
6 presence, Your Honor, but it was a long morning for the  
7 court reporter, I have no doubt, and for the court. We were  
8 there for nearly five hours. It was a long hearing. It was  
9 -- it was a pleasure to be part of, but --

10 So I guess, you know, high-level information in  
11 terms of what we know from the bucket process so far, there  
12 are a total of around 150 or 160 Bucket 1 kind of cases  
13 where there's potentially a proof of use issue. Obviously,  
14 we're going to have to get through, like, the full dispute  
15 on that, but this isn't a situation where it's 10 percent or  
16 20 percent or 50 percent of the universe of cases. We  
17 really have a very small fraction of folks where they are  
18 saying for one reason or another, you know, they seem to  
19 agree it is a Bucket 1 case. Why they filed it, I cannot  
20 tell Your Honor, but it's not a huge problem. And I think  
21 that that is, at least, as a starting point, a really  
22 important kind of datapoint for us.

23 You know, there were a bunch of filings I think  
24 yesterday or letters to Your Honor about the statute of  
25 repose and some other issues. Frankly, I haven't read all

1 the way through those. I flew back myself last night,  
2 but -- so I guess we'll slog through those. They are  
3 looking at the proof of use information that we have  
4 submitted.

5 And I think that, you know, that there is good  
6 value in trying to continue the process. And I think that  
7 these meetings informally are -- I guess they are formal,  
8 but are useful, but --

9 THE COURT: Which reminds me. It was only formal  
10 because on my calendar someone was going to call in; and if  
11 they are going to call in, I've got to sit up here; if I'm  
12 going to sit up here, I've got to sit up here in the robe.

13 MS. ZIMMERMAN: In the robe.

14 THE COURT: Right. Go on. Sorry.

15 MS. ZIMMERMAN: Well, and I think somebody  
16 probably saw status conference and my guess is they thought,  
17 oh, I want to listen in on that, we haven't had one for a  
18 bit.

19 So, you know, I think that it's a worthwhile  
20 process. You know, from our perspective we have to be a  
21 little mindful of, kind of, what the goal is here, I mean,  
22 and I think that, you know, the goal for everybody at some  
23 point is reaching a resolution on this case. Obviously,  
24 from the defendant's perspective that goal is going to be  
25 with zero dollars and all dismissals with prejudice and we

1 are all done. We don't share that goal. But, you know, to  
2 the extent that this has the potential to almost kind of  
3 back its way into a lone pine, which is, when I look at some  
4 of the, you know, kind of responses we are getting, starts  
5 to feel a little bit like that, you know, I don't know that  
6 that is going to be particularly productive from our end. I  
7 mean, I don't think we have a real proof of product issue  
8 here, not broadly. We can deal with the 150-odd cases with  
9 the Bucket 1. But, anyways, I think we'll keep slogging  
10 through.

11 MR. ASSAAD: And I would like to add something  
12 else, and I echo Ms. Zimmerman's remarks.

13 There's always going to be a reason to delay. If  
14 the motion is denied, we will argue -- or there will be a  
15 need to delay for the *Gareis* appeal; and if the *Gareis*  
16 appeal is -- if it comes back, it might be, you know,  
17 appealed to the supreme court. So there's always going to  
18 be some reason we can justify a delay. And, personally, I  
19 think this is probably the best time to get stuff done  
20 because there's nothing going on in the case. You know,  
21 personally, I think it is just a bunch of motions that have  
22 nothing to do with the actual substance of the case that's  
23 going on right now. We have the time. I think we should  
24 push through it as quick as possible, because there might  
25 be -- I don't know what Judge Ericksen is going to rule; but



1 if she denies their motion for a reconsideration or motion  
2 for Daubert, then we are going through the bellwether  
3 process and we can use this information, that if we can get  
4 this done in the next month and a half, we will have a  
5 chance to pick good bellwether cases that don't get  
6 dismissed for product ID or statute of limitations or  
7 statute of repose later on. So my point of view is let's --  
8 we have the time, nothing else is going on, let's push this  
9 through as quick as possible, less delay, we can use our  
10 resources on this instead of other matters, which I think  
11 are not useful.

12 THE COURT: Okay. Very well.

13 Mr. Hulse.

14 MR. HULSE: In this we are in agreement. We think  
15 it's --

16 THE COURT: Would you mark that, please?

17 MR. HULSE: Maybe I should just stop there and  
18 conclude the hearing there. It's -- for exactly the reason  
19 Mr. Assaad said, if there is a denial or a partial grant,  
20 something in between, we've talked about that middle of the  
21 road scenario, we're going to need to pick bellwethers again  
22 and this -- that was an important objective of this process.

23 THE COURT: Yep.

24 MR. HULSE: So I think from our perspective we  
25 have -- you know, we wanted this to happen, very much still

1 want it to happen. You know, our hope was that this was  
2 going to lead to kind of culling, culling the wheat from the  
3 chaff. That I don't know, I don't know, whether it's going  
4 to achieve that. We're still trying to get there, but we  
5 think the process should still keep moving likewise in the  
6 interim.

7 THE COURT: Okay. So a couple -- one observation  
8 and then some questions, I guess. The observation -- I  
9 understand about the -- it may -- the process may not cull  
10 as many cases as one side might like, but, again, we're also  
11 dealing with -- I think what we're dealing with in large  
12 part is, you know, broadly speaking, three categories.  
13 Right? We know these cases just can't go on. We know these  
14 cases absolutely go on to at least summary judgment or  
15 trial. And then this third category of, well, there may be  
16 an issue that needs further development and that may, well,  
17 just by virtue of its nature that we were trying to be -- it  
18 was surgery with an axe, right, and we were trying to be  
19 broad and efficient. That may result in culling, as it  
20 were, fewer cases than eventually would get dismissed,  
21 but --

22 Okay. So where are we? What do we need to do?  
23 How can I help? Again, I'll start -- you're on the P side  
24 of the V, so --

25 MS. ZIMMERMAN: Thank you, judge.

1           So we -- as I said, I'll review the letters that  
2           we received yesterday from Ms. Lewis with respect to the  
3           statute of repose challenges.

4           You know, Your Honor kind of outlines a process at  
5           least with respect to the Bucket 1, the agreed-upon Bucket 1  
6           cases. And I think that, you know, some of those cases, if  
7           everybody agrees that they are Bucket 1, are likely to be  
8           dismissed with prejudice without too much fanfare. And I  
9           think it's 60 days.

10          THE COURT: So I think procedurally, at least as I  
11          know what I have here, I have spreadsheets or, yeah,  
12          spreadsheets for statute of repose Bucket 1 cases. And the  
13          ball's sort of in your court to decide is do you agree or do  
14          you disagree; and if you disagree, why.

15          MS. ZIMMERMAN: Right.

16          THE COURT: If you don't disagree, then it will  
17          probably get dismissed, right?

18          MS. ZIMMERMAN: Yes.

19          THE COURT: Okay. And I understand the issue  
20          about Indiana. It really, from the plaintiffs' perspective,  
21          it ties the application of the statute of repose to the  
22          accrual of the cause of action, which may or may not depend  
23          upon either an allegation of fraudulent concealment or a  
24          latent discovery or a delayed discovery issue.

25          MS. ZIMMERMAN: Yes.

1 THE COURT: I think the way to deal with Indiana  
2 at least for now is you need to respond to the letter.

3 MS. ZIMMERMAN: Right.

4 THE COURT: And then -- I don't want to multiply  
5 the proceedings here, but once I have both sides'  
6 expressions on this I will figure out do we need argument,  
7 do we need full briefing, what does the court think it  
8 needs.

9 MS. ZIMMERMAN: That sounds perfect, Your Honor.  
10 And we will try to maybe reflect our, kind of, thoughts in  
11 that regard toward the conclusion of our letter in response,  
12 just saying whether we think that these can be gone or, you  
13 know, with respect to Indiana if there's going to need to be  
14 more fulsome briefing to kind of address that issue. Maybe  
15 it gets set to the side for whenever we do full briefing on  
16 various state issues.

17 THE COURT: Okay. So that's statute of repose.

18 Where are we on the -- the other side of it was  
19 product ID. And then we have the whole categorization of  
20 injury-type stuff. Where are we on the product ID?

21 MR. ASSAAD: Before we get there, I just have a  
22 question.

23 THE COURT: Sure.

24 MR. ASSAAD: And this is more of a logistic issue.  
25 I know they filed a statute of repose, but I am wondering if

1 individual emails or letters went out to the individual  
2 firms. I know it's been globally filed, but I'm not sure  
3 that everyone has been on notice that their case might be  
4 dismissed in 30 days. And I think that would be a due  
5 process issue, because I don't represent all those cases,  
6 you know.

7 THE COURT: Right.

8 MR. ASSAAD: So I'm not sure if the defendants  
9 individually sent individual letters saying you have -- your  
10 cases have been put on the statute of repose that's going to  
11 be dismissed within 30 days, because I'm not sure everyone  
12 knows that their case is on the list.

13 THE COURT: Right. And I'm not sure -- I haven't  
14 gone back to review this -- I am not sure it was on your  
15 plate to do that, however.

16 MR. HULSE: That's plaintiffs' counsel.

17 THE COURT: Yeah, I think that's leadership to  
18 communicate --

19 MS. ZIMMERMAN: We communicated the original  
20 statute of repose challenges to each of the individual  
21 firms. We have not sent Ms. Lewis' spreadsheet or letters  
22 from yesterday.

23 THE COURT: Okay. Well, obviously, I think you've  
24 got to do that and these people do have to have an  
25 opportunity to respond, but I want that all filtered through

1 leadership rather than a whole bunch of letters from the  
2 court -- to the court. Okay.

3 All right. So where are we on the product ID  
4 then?

5 MS. ZIMMERMAN: So the product ID, Your Honor, is  
6 a massive spreadsheet. It's an Excel spreadsheet with  
7 multiple tabs for Bucket 1, Bucket 2, Bucket 3. As I  
8 mentioned, Bucket 1 is really not very big. I think it's  
9 about 160 cases. I was surprised actually Bucket 2 was  
10 larger than Bucket 3. So people really feel pretty  
11 confident that they have indisputable evidence of Bair  
12 Hugger use.

13 I got an email, as mentioned earlier, from  
14 Ms. Lewis, counsel for defendants, yesterday afternoon. She  
15 noted that there are 27 firms that they have not yet heard  
16 from and that is out of the 147. So we have most of the  
17 information in. And I know that our lists are a little bit  
18 off in a couple of regards, so we will get that cleaned up,  
19 but we did provide the master spreadsheet on the last  
20 Monday, the 17th. And we will continue to kind of refine  
21 that as we get additional information in and we track these  
22 things down from individual counsel.

23 For the most part, people did fill out the full  
24 master spreadsheet that we submitted, so it was reasonably  
25 easy. There were a couple of firms that had big case

1 inventories who maybe were off by one or two columns. So we  
2 don't have latency information, for example, just yet on  
3 every case, but we do have it on a lot of the cases. So  
4 that's helpful. Also, injury information, we just thought  
5 it would be easier for people if we sent out a spreadsheet  
6 to start with with requesting more information than less so  
7 that they could go through their files once, if possible.  
8 So we have exchanged that information. We are going to --  
9 our goal is to update it essentially on a weekly basis so  
10 that we can get all this information in. I certainly hope  
11 we will have it complete with these missing 25 firms or so  
12 inside the next two weeks or so.

13 THE COURT: Okay. Mr. Hulse.

14 MR. HULSE: Just one thing to add on the product  
15 ID, Your Honor. So we do appreciate that we got the  
16 combined list from plaintiffs' counsel. The problem is, is  
17 that it's not a sortable Excel spreadsheet. Your Honor's  
18 direction was that it should be sortable at the last  
19 hearing.

20 And without getting too deep into the Excel  
21 details, essentially, you know, you've got the case number,  
22 you've got the date. Those are different columns. But the  
23 data is entered in different ways, different formats, so you  
24 can't sort it. It makes it a difficult spreadsheet for us  
25 to work with.

1           So our request is this: Our preference would, of  
2           course, be that the plaintiffs provide us a sortable  
3           spreadsheet; but if we're going to take the time to fix it,  
4           it's a time-consuming matter for our staff to do, we would  
5           just like to push back, push back our time table for  
6           responding, so we have a little bit of extra time to fix up  
7           this spreadsheet so we can work with it.

8           So my suggestion -- I proposed this to plaintiffs'  
9           counsel yesterday -- is that we have until July 9th to get  
10          the spreadsheet fixed up and then our 60 days -- it's  
11          60 days, right -- runs from that point forward. So it's a  
12          slight extension to the time.

13          THE COURT: Okay. Any objection to that?

14          MS. ZIMMERMAN: You know, I'm just trying to look  
15          to see where Mr. Hulse's email was from yesterday.

16          MR. HULSE: Yes. Here, let me --

17          MS. ZIMMERMAN: Because this is the first I am  
18          hearing that he can't sort our spreadsheet.

19          MR. HULSE: May I hand this up? This is just --

20          THE COURT: Please, yeah.

21          While you are looking, Ms. Zimmerman, I will make  
22          an observation, which is -- I mean, I think it's obvious,  
23          but these spreadsheets, as far as I'm concerned, well,  
24          whether we call them Rule 408 or not, they are not going  
25          into any evidence at any point, so you shouldn't be



1 concerned about, you know, sharing work product as it were.

2 MS. ZIMMERMAN: No, we've -- we thought that we  
3 provided a workable spreadsheet. So if it is not sortable,  
4 it's going to be not particularly useful for any of us.

5 We don't have a problem with July 9th.

6 MR. HULSE: So my preference would be that  
7 plaintiffs' counsel, particularly, because they are going to  
8 be gathering information from those additional firms, would  
9 make it sortable.

10 THE COURT: Right.

11 MR. HULSE: But, like I said, I mean, if -- if  
12 that's not feasible for them, we can do it too. It's just a  
13 time-consuming thing.

14 THE COURT: Right. If there is -- again, here's  
15 an observation more than an order as it were: If there is  
16 an easy way, because you have it, for you to just fix the  
17 sortability issue, by all means do it.

18 If -- you are both in the same position -- you're  
19 highly motivated to do it, why don't you do it.

20 But at least try to -- try to be on the same page  
21 about the fix as it were.

22 MR. HULSE: Right. As Ms. Zimmerman says, we are  
23 going to be using the spreadsheet. It is in our mutual  
24 interest.

25 THE COURT: Right.

1 MR. HULSE: So key for us was just that we have  
2 the additional time built in to our response deadline for  
3 this, and it sounds like that's amenable.

4 THE COURT: Yeah. Okay. So that's -- I will  
5 assume, and I am not going to -- I don't -- I guess we'll  
6 issue a minute order on it. The extension of time is  
7 granted. Your 60 days will run from July 9th.

8 MR. HULSE: Thank you, Your Honor.

9 THE COURT: Okay. Okay. Anything else that you  
10 need to bring up, and is there anything that you need from  
11 me?

12 MR. HULSE: Just a couple things. It might be  
13 helpful if also -- well, given that you are doing a minute  
14 entry anyway -- to provide a deadline for the plaintiffs'  
15 firms that have not yet provided the information to  
16 plaintiffs' colead counsel -- maybe that's the July 9th  
17 deadline too -- that they need to get it in or otherwise  
18 there would be a show cause as to why their cases should be  
19 dismissed, but something to incentivize them.

20 THE COURT: Something to, yeah, move them along.

21 MS. ZIMMERMAN: Well, so one thing that we have is  
22 that the order that Your Honor entered on I think it was  
23 May 17th, a lot of -- a lot lawyers across the country  
24 interpreted the 60 days as starting from then, and so that  
25 would give them really till, whatever, July 17th. We have

1 worked very hard with people to get them to step on the gas  
2 and get things in early, but to the extent that you are  
3 talking about a show cause order that would put the deadline  
4 ten days before the existing deadline I don't think that  
5 that would be appropriate.

6 MR. HULSE: Right. And we have no objection to it  
7 being July 17th, just some date.

8 THE COURT: Right. We'll look at the May 17th  
9 order. I assume -- you know, look, the thing that, among  
10 many, that has become very apparent to me in this job is  
11 that the law of unintended consequences lives very well in  
12 the courtroom. So we'll look at May 17th. I assume it's a  
13 reasonable interpretation, and we'll respond accordingly.

14 MS. ZIMMERMAN: And we are doing everything we can  
15 to get people -- I mean, and they have been quite responsive  
16 given that some folks out there -- they still have another,  
17 what, month or so.

18 THE COURT: Okay. Anything else, Mr. Hulse?

19 MR. HULSE: Well, I think the other issues on this  
20 email are -- I understand Ms. Zimmerman was traveling  
21 yesterday, so hopefully they are ones that we can just reach  
22 resolution on amongst ourselves and not require the court's  
23 intervention on.

24 THE COURT: Yeah, why don't you -- why don't you,  
25 when you have time to respond, do so; and if you need court

1 intervention, certainly do it. We can always get on a  
2 telephone call. But if you don't, all the better. In the  
3 meantime I will spend some time with these submissions that  
4 were filed yesterday, I guess.

5 MR. HULSE: A couple days ago.

6 THE COURT: Or Wednesday. And I guess we'll wait  
7 to see what the plaintiff responds on those. All right?

8 MR. HULSE: Right.

9 MS. ZIMMERMAN: Yes.

10 MR. HULSE: And I think they have 30 days, right?

11 MR. HARTMAN: 30 days.

12 MR. HULSE: So you may not need to look at them  
13 right now, Your Honor.

14 THE COURT: Okay. Fair enough.

15 Okay. Anything else, Ms. Zimmerman? Mr. Assaad?

16 MS. ZIMMERMAN: I don't think so. I don't know  
17 if -- we'll obviously be in front of Your Honor on the 16th  
18 of July.

19 THE COURT: Right.

20 MS. ZIMMERMAN: And I don't know if we need to set  
21 another status conference formally or informally with Your  
22 Honor. The next MDL status conference with a couple of  
23 hearings I think set -- or a couple motions set for hearing  
24 is August 15th with Judge Ericksen.

25 THE COURT: Okay. Why don't we revisit that topic

1 on the 16th and see if we need anything between then and  
2 August 15th.

3 MS. ZIMMERMAN: Okay.

4 THE COURT: And we will try and free up as much  
5 time as possible, but -- yeah, I know, I know who the other  
6 case is that's coming in, but we will certainly have enough  
7 time for the argument. Okay. I think that's it.

8 Mr. Assaad, thanks for traveling up here from  
9 Texas.

10 MR. ASSAAD: The weather is much nicer here right  
11 now than it is in Texas.

12 THE COURT: I have been in Donna, Texas, in  
13 August, which gets me back to that Far Side cartoon that I  
14 started with. It was hotter than blazes, my goodness.

15 All right. We are in recess. Thanks, everyone.

16 THE CLERK: All rise.

17 (Court adjourned at 10 a.m., 06-28-2019.)

18 \* \* \*

19 I, Renee A. Rogge, certify that the foregoing is a  
20 correct transcript from the record of proceedings in the  
21 above-entitled matter.

22 Certified by: /s/Renee A. Rogge  
23 Renee A. Rogge, RMR-CRR  
24  
25